

No. 89-1796

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1989

JOHN HASSO, ELISSA N.V., RUMBA, N.V.,
PACIFIC MIDLAND, N.V., KONDOLAND CORP. AND
GRAPE CAPITAL CORP.,

Petitioners,

v.

CHARLES DUGGAN,

Respondent.

On Petition For Writ of Certiorari
to the Court of Appeals of
the State of California

PETITIONER'S REPLY BRIEF

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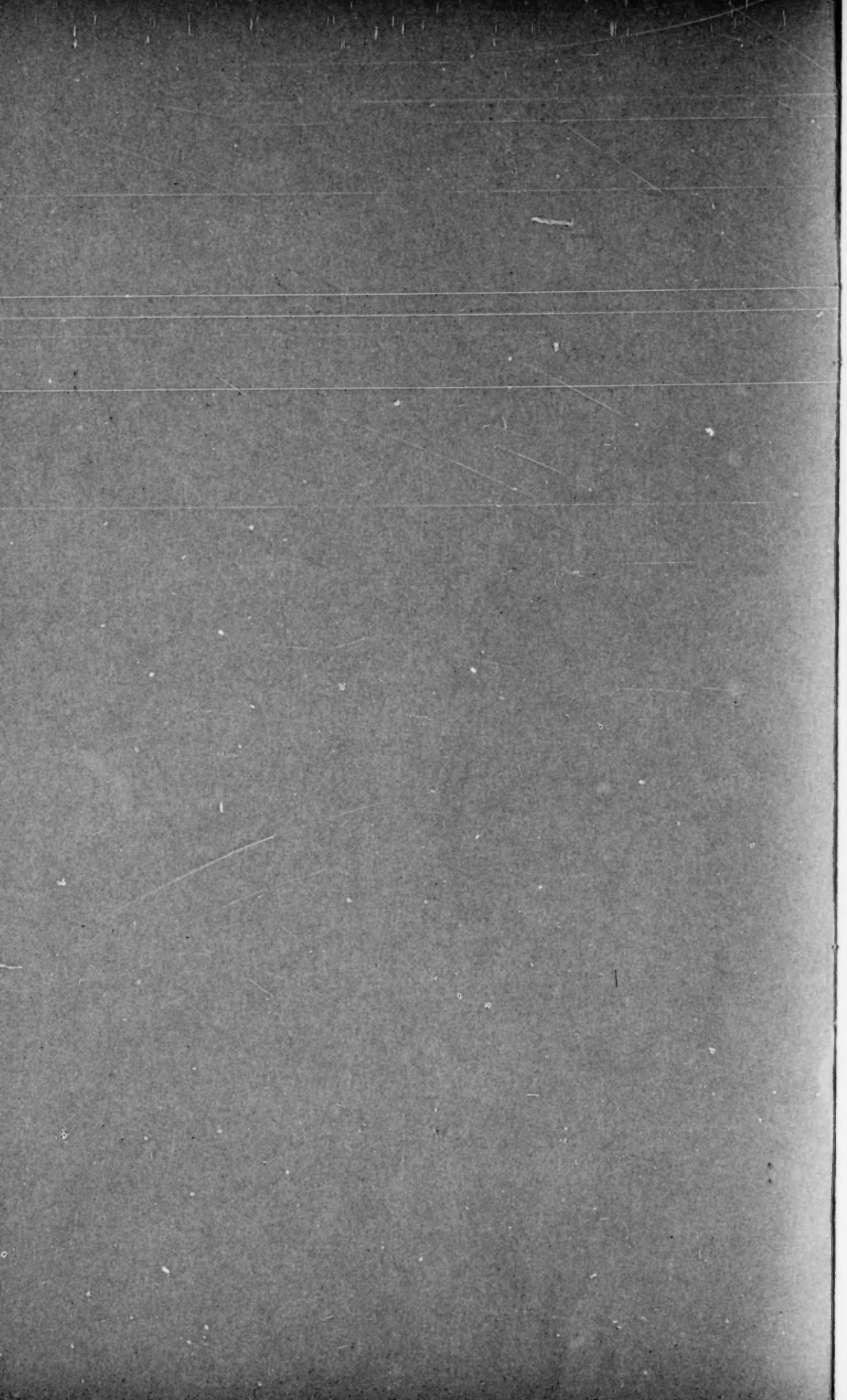


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REPLY STATEMENT OF REASONS FOR GRANTING HASSO'S PETITION

Respondent's cursory discussion of *Pacific Mutual* implicitly acknowledges the Court's unique opportunity, if it grants review in this case, to treat comprehensively the due process issues involved in state court proceedings for the award of punitive damages. This Court should take advantage of the opportunity to review this case in conjunction with *Pacific Mutual*.

The trial court's evidentiary rulings deprived Hasso of the ability to defend himself on the issue of reprehensibility and thus denied him due process. Respondent's opposition also concedes that the punitive damage award was based on Hasso's attempts to defend himself. The issues were adequately raised and the case presents a clear record for consideration of the Due Process Clause questions.

I. THE TRIAL COURT'S EVIDENTIARY RULINGS DEPRIVED HASSO OF HIS DUE PROCESS RIGHTS

Respondent's argument that the trial court merely applied rules of evidence in excluding all of Hasso's mitigating evidence misses the point of the due process issues. The evidentiary rulings violated due process as they barred Hasso from defining the degree of the fraud for the jury even though the degree of the fraud – Hasso's "reprehensibility" – was the central issue at the trial.¹

¹ Evidentiary rulings can, of course, amount to a violation of due process. See, e.g., *McGuire v. Estelle*, 1990 U.S. App. LEXIS 6995 (9th Cir. 1990).

A. Res Judicata Rules Cannot Supersede Due Process Rights.

Common law rules of *res judicata* cannot control the conduct of a trial where they conflict with a defendant's due process rights. The assertion of *res judicata* to exclude evidence of the circumstances of the fraud barred Hasso from defending himself on the key issue. This denied him due process. *Bell v. Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591 (1971).

Moreover, *res judicata* was not a proper basis for excluding mitigating evidence in this case. Hasso never contended that the jury could ignore the judgment of liability, and the jury was instructed that Hasso committed fraud. The trial was about punishment, not liability.

Respondent notes (p. 8, fn. 5) that Judge Champlin was concerned that Hasso wanted to put in evidence that "it was just a little fraud," and that this would confuse the jury. Of course, the precise question the jury was asked to answer in determining the "reprehensibility" of Hasso's conduct was whether the fraud "was just a little fraud." Speculation that the jury might be confused cannot override Hasso's right to defend himself.

B. Relevance Determinations Are Not Immune To Due Process Scrutiny.

Respondent's statement (p. 2) that the evidence Hasso offered was found not to mitigate Hasso's conduct confuses relevance with burden of proof. The jury in the 1982 trial did not think defendants' evidence sufficient to

defeat plaintiff's burden of proof as to liability. But punishment, not liability, was the issue for the jury in the second trial and plaintiff carried a separate burden of proof as to reprehensibility.

Even in criminal cases the sentencer is required to consider extenuating evidence. The evidence does not permit it to overturn the guilty verdict; yet, it does permit the sentencer to consider a lesser punishment. The jury in this case, for example, might have concluded that Hasso had mixed intentions when he entered the deal and renegeed only because Duggan's subsequent conduct made the deal far less attractive. This is far different from a conclusion that Hasso from the start had the sole intent to defraud Duggan and manipulated events thereafter with only fraud in mind. Each of these two scenarios might support a finding of fraud, but they support different conclusions about the reprehensibility of the conduct and the punishment deserved.² Because reprehensibility was at issue, and because all frauds are *not* equal, the evidence Hasso offered was relevant and he had a due process right to present it to the jury.

² Respondent's allegation (p. 11, fn. 9) that Hasso misstated the trial court's view of the fraud issue is incorrect. The trial court stated at the end of the first trial:

I don't think the evidence is there to show that he entered into this agreement with an intent at the beginning to defraud plaintiff. I think they just had the typical kind of falling out that frequently happens to joint ventures. [RT (first trial) 1524-25 (emphasis added). See AOB 66.]

In concluding later that sufficient evidence supported the fraud verdict, the trial court must have had in mind the first scenario above, not the second.

C. Convenience Cannot Outweigh Hasso's Due Process Rights.

Because the mitigating evidence Hasso offered was relevant, the conclusions based on California Evidence Code section 352 were also incorrect. Exclusion of evidence based on administrative convenience cannot outweigh the due process right to defend oneself, particularly where the evidence goes to the heart of the criteria by which punitive damages will be assessed.

II. RESPONDENT CONCEDES THAT THE PUNITIVE DAMAGE AWARD WAS BASED ON POST-TRIAL LITIGATION CONDUCT UNRELATED TO THE FRAUD AT ISSUE

Respondent concedes that Hasso's attempts to stay execution of the judgment pending appeal and to defend himself served as the principal bases for the punitive damage award. (See Opposition at pp. 7, 11-12, 26-27.) There is thus no doubt that Hasso was required to pay millions of dollars to plaintiff based on his assertion of rights to a proceeding free of prejudicial error and based on alleged "deceits" with which he was never charged and against which he did not have a fair opportunity to defend.³ The case therefore presents a clear record for the Court to pass on the Due Process Clause questions presented.

³ The appropriate remedies in any case for alleged litigation abuses are court sanctions or a separate action raising abuse of process or other tort claims.

III. THIS COURT CAN AND SHOULD CONSIDER HASSO'S FEDERAL DUE PROCESS QUESTIONS

This Court is empowered to review constitutional questions in its discretion. No jurisdictional bar limits review of important questions, only prudential concerns. *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79, 108 S.Ct. 1645 (1988). This Court has not hesitated to review due process questions in particular when the constitutional error is clear and substantial. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 265 n. 5, 101 S.Ct. 1097, 1100 n. 5 (1989). The Court should not hesitate to review the important due process issues in this case.

A. The Due Process Right To Present Mitigating Evidence Was Adequately Raised Below.

Although Hasso did not mention "due process" in arguing that he should be permitted to introduce mitigating evidence, the trial court made it clear that it understood that the issue was Hasso's right to present a defense to the punitive damages claim. [RT 853:17-22.] Hasso further argued in the motion for new trial that he should be allowed to introduce mitigating evidence because he had a due process right to defend himself. There he stated that the court "violated fundamental due process" in excluding the evidence. [CT 1109:8-14.]

Hasso also raised this due process issue in Appellant's Opening Brief. He argued that the exclusion of evidence of the circumstances surrounding the fraud "effectively deprived defendant of a fair trial on punitive damages." [AOB 41.]

This Court does not require that a petitioner have cited in the trial court to the specific Constitutional provision relied upon to obtain review if the constitutional issue was otherwise adequately raised. In *Taylor v. Illinois*, 484 U.S. 400, 407 n.9, 108 S.Ct. 646, 651 n.9 (1988), for example, petitioner, as in this case, did not cite to the Sixth Amendment until his petition for rehearing in the court of appeal. The Court noted that petitioner had made a generalized objection in the court of appeal based on "due process" which the Court took as a constitutional objection. *Id.* Petitioner had also cited to cases which relied in part on Sixth Amendment arguments. *Id.* The Court held that under these circumstances the issue was sufficiently well presented to support its jurisdiction. *Id.*

The right to defend oneself derives from due process standards. This is not a case like *Taylor* where the specific constitutional source for right asserted was unclear. The trial court recognized that the issue was Hasso's right to defend himself. The due process issue therefore was before the trial court and the Court of Appeal.

B. The Due Process Right Not To Be Punished For Exercising The Right To Defend Oneself Was Adequately Raised Below.

Hasso argued to the trial court and on appeal that admission of evidence of litigation conduct deprived him of his right to defend himself, citing cases which relied on fundamental principles of due process. This case therefore falls squarely within *Taylor v. Illinois*, where the Court found it significant that cases cited on appeal set

forth the precise constitutional provision relied on in the petition for certiorari. Review is therefore appropriate.

In the motion for new trial, Hasso argued that the admission of evidence regarding post-trial litigation conduct denied him his fundamental right to defend himself. He cited the court to *Palmer v. Ted Stevens Honda, Inc.*, 193 Cal.App.3d 530, 238 Cal.Rptr. 363 (1987), holding that evidence of a defendant's litigation tactics was inadmissible to prove bad faith. [CT 1339-1354.] *Palmer* concluded that introducing such evidence deprived a defendant of his fundamental right to defend himself. 193 Cal.App.3d at 539, 238 Cal.Rptr. at 368.

Hasso stated also in Appellant's Opening Brief that admitting the evidence of litigation conduct "violated settled law protecting a litigant's right to defend himself . . . " and cited *Palmer* and other cases based on "considerations of fundamental fairness and the right to a vigorous defense." [AOB 45, 47.]

Hasso also cited *In re Marriage of Flaherty*, 31 Cal.3d 637, 183 Cal.Rptr. 508 (1982), in which the California Supreme Court defined standards for imposing sanctions for filing a frivolous appeal. The court expressed its concern that standards not chill litigants' rights to pursue redress on appeal and that they be precise enough to afford litigants notice and an opportunity to respond to charges. *Id.* at 650, 651, 183 Cal.Rptr. at 516-517. In support, the court cited United States Supreme Court cases affirming a litigant's rights under the Due Process Clause to notice and an opportunity to defend against charges. Thus, as in *Taylor*, the due process issue was adequately raised through citation to relevant cases.

Hasso's failure to object to some of the evidence of litigation conduct at trial does not preclude review. The trial court made it clear during opening statements that any such objection would be futile. The court stated that all evidence concerning the appeal and the efforts to stay execution of the judgment pending appeal *would be the focus of the trial*:

I think where this battle lies this time around is what's happened since the judgment. *You have a spectator [sic] of Mr. Hasso using essentially Mr. Duggan's money to stay the execution of a judgment.* [RT 989:1-4 emphasis added.]

Under California law, objections are not required where they would have been futile. *See People v. Brooks*, 88 Cal.App.3d 180, 166, 151 Cal.Rptr. 606, 609 (1979). This Court, moreover, even where the state court found that a failure to object precluded review, has determined that the objection would have been futile and found that the question was sufficiently preserved. *See Douglas v. Alabama*, 380 U.S. 415, 422, 85 S.Ct. 1074, 1078 (1965).⁴

⁴ The California Supreme Court denied review without comment. Thus, it is not true (Opposition, p. 6) that they did so on the grounds that the issues were not adequately presented below. In any case, this Court's jurisdiction to review the Due Process Clause issues is not constrained by state court limits on review of issues not adequately raised in the trial court. Even assuming that the Court of Appeal's denial of the petition for rehearing without comment, and the California Supreme Court's denial of review without comment, were "silent application[s] of a procedural bar," *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 2426-27 (1982), such a state procedural bar does not preclude Supreme Court review where the bar is not "strictly or regularly followed." *Id.* at 263, 102 S.Ct. at 2426.

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C. The Due Process Right To Be Free Of Arbitrary Punitive Damage Awards That Bear No Relation To An Amount Necessary To Punish And Deter Is Reviewable In Connection With Pacific Mutual.

Hasso did not raise this issues below in due process terms; however, under the circumstances here this Court can and should consider the due process question presented.⁵ First, the factual record is complete on this issue. Making the arguments specifically in due process terms would not have altered the factual record. It is a matter

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California appellate courts may, in their discretion, review questions, including constitutional questions, not raised in the trial court. *Canaan v. Abdelnour*, 40 Cal.3d 703, 722 n.17, 221 Cal.Rptr. 468, 480 n.17 (1985). The rule applies in cases in which the issue was not raised at all by the appellate briefs. See *id.* (issue raised for the first time in oral argument before the California Supreme Court); *Wilson v. Lewis*, 106 Cal.App.3d 802, 805, 165 Cal.Rptr. 396, 398 (1980) (issue raised by appellate court on its own motion). Thus, even assuming *arguendo* that the constitutional issues were not raised in the trial court, and that the denial of the petitions for rehearing and review were based on such failure, this Court nonetheless has jurisdiction to review Hasso's Due Process Clause questions.

⁵ Respondent misreads *Browning-Ferris Industries v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989), on the reviewability of proportionality standards. There petitioner, after the Court had already refused to consider proportionality standards under the Due Process Clause, asked the court to craft federal common law standards of proportionality. The Court concluded that, apart from the due process issues which it would not consider, proportionality was a state law issue. *Id.* at 2921-22. The Court did not preclude consideration of proportionality in the context of due process standards.

only of application of due process standards to the amount of punitive damages awarded in relation to (1) the amount of compensatory damages and (2) the amount of Hasso's net worth. Thus, this is not a case where making the constitutional argument would have required additional facts and analysis not found in the record. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 221, 103 S.Ct. 2317, 2323 (1983).

Second, this Court has granted certiorari in *Pacific Mutual* apparently to consider identical issues. Any standards established in that case will apply to all future California punitive damages cases; thus *Pacific Mutual* renders moot any need to allow the state court to fashion its own remedies. *See id.*

IV. CONCLUSION

This Court should grant the petition for certiorari for consideration in conjunction with *Pacific Mutual*.

Respectfully submitted,

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